No. 3027.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK E. WHELPLEY,
Appellant,

vs.

ANDREW GROSVOLD,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLANT.

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A further consideration of the record in this case and of the briefs heretofore filed induced the belief that the Court might be aided by additional points and authorities on behalf of the appellant and to that end permission was obtained from the Court to file this supplemental brief and argument.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court for the Territory of Alaska, Third Division, forever enjoining and restraining the defendant in

that Court, the appellant herein, from trespassing upon Little Koniuji Island, in the Territory of Alaska, or in anywise disturbing the possession of the plaintiff in said island.

Little Koniuji Island, in the Shumagin Group, is about six miles long by three miles wide and lies immediately south of the Alaska Peninsula. It became part of the public domain of the United States at the time of the acquisition of Alaska in 1867. It is not one of those islands of Alaska frequented by fur-bearing seals, but for a number of years it has been occupied by different persons engaged in propagating thereon foxes, with which it has been stocked, these foxes not being native to that part of Alaska. From the record in this case it appears that the island has been so used since 1895 (Trans., pp. 150 and 153), and was so used from 1896 to 1900 inclusive, by one Rudolph Neumann and the representative of his estate (Trans., pp. 178-185). The record is silent as to its occupancy for the next two years, but it appears that about 1904 (Trans., p. 150), and perhaps as early as 1903 (Trans., p. 154), it was occupied by one Lawrence Reid for the propagation of foxes, he having acquired his rights in the island from the Alaska Commercial Company in 1902 (Trans., p. 117). Reid continued in undisputed possession thereof (Trans., pp. 154-155) until March, 1913, when the defendant, Whelpley, paid him $600 for a sixty-day option of purchase on all of his property on the island and sent a man to look after the property (Trans., p. 66). He concluded the purchase on May 8, 1913, receiving from Reid a bill of sale of

all the property on the island, including the foxes, buildings, etc., which was recorded on that date (Trans., pp. 197-198). He paid Reid the purchase price, $4,000, on May 13, 1913, went into possession of the property and continued in undisputed possession thereof until his possession was disputed by the plaintiff, Grosvold, claiming under a lease executed by the Department of Commerce on July 30, 1914 (Trans., pp. 66-67 and 148).

Whether the island was ever actually leased by the United States prior to the lease of July 30, 1914, does not affirmatively appear, but it appears that for some years prior to 1900 a revenue cutter called at the island each year and the officer in charge collected from the occupant $100, apparently for the privilege of occupying the island (Trans., pp. 128-129), and there are in the record five unsigned papers, each on the letter-head of the Treasury Department and in form purporting to grant under an act of Congress of March 3, 1879, permission to occupy the island for one of the years from 1896 to 1900 for the purpose of raising foxes thereon during such year, and acknowledging the receipt of $100 (Trans., pp. 178-185).

After 1900 nothing was done toward leasing the island until the fall of 1913 when the Secretary of Commerce and Labor called for bids for the privilege of leasing the island for five years for the propagation of foxes. Two bids were submitted, one by F. E. Williams, a partner of defendant, for $200 per year, the minimum prescribed by the department, and the other for $205 per year by the plaintiff Grosvold.

The latter's bid was accepted and a lease of the island for five years from July 1, 1914, to the plaintiff, Grosvold, was executed on behalf of the United States by the Assistant Secretary of Commerce on the 30th day of July, 1914 (Trans., pp. 10-12).

At that time the defendant had been continuously in undisputed possession of the island since May, 1913, and he continued thereafter in possession as hereinafter stated. As the findings of fact are absolutely silent upon the question as to who was in possession of the island during the period of time involved in the suit, we are forced to draw our conclusions as to that matter from the evidence.

According to Grosvold's own statement he did not attempt to take possession of the island until September 1, 1914 (Trans., p. 38). It appears, however, that in the interim from the time the defendant went into possession in May, 1913, until some time in August, 1914, the defendant was, by himself or his men, in undisturbed possession of the island (Trans., pp. 143 and 148). But it appears throughout the record that about September 1, 1914, there began a scrambling possession of the island—Grosvold and his men being there part of the time and Whelpley and his men at other times, and some of the time there were representatives of both parties on the island at the same time. During all of this time both parties claimed the right of possession and claimed to be in possession, and at various times each of them or their men trapped foxes upon the island. This continued until about the time of the commencement of this action, and though

no foxes have been trapped by the defendant since then, he had a man representing him on the island at the time the case was tried (Trans., p. 83).

Before concluding this statement of the case one further matter should be noted. At the time the lease was executed on July 30, 1914, and also on July 1st of that year, the time when the term of the lease commenced, there were on the island buildings, corrals, traps, etc., all of which had been either purchased by Whelpley from Reid, or placed thereon by Whelpley subsequently, and also many pairs of foxes, either so purchased or stocked or raised thereon by Whelpley. At that time, according to the testimony of the caretaker in charge, there were about seventy pair of foxes on the island (Trans., p. 157). The cohabiting and breeding season of these foxes runs from March to July; from August to November they are trapped alive for breeding and propagating purposes, and from December to February they are trapped for their skins, the trap which is used for catching them alive being of a different kind from that used in catching them for their skins (Trans., pp. 77-78). The increase is about one hundred per cent in a breeding season (Trans., p. 75), and after seventy-four foxes were removed in the summer of 1914 it was estimated that there were left about seventy pair of foxes in September of that year (Trans., pp. 92-93). In the fall of 1914 and spring of 1915 Whelpley and his men trapped twenty-six pair of foxes but were not able to take more that year owing to the presence and interference of Grosvold and his men (Trans., pp. 77-78).

A breeding season ensued in the spring and early summer of 1915 and in October of that year Grosvold, through his men, put nine foxes on the island and a few days later seven foxes (Trans., p. 137). During December of that year, 1915, Whelpley and his men trapped fourteen foxes (Trans., p. 81), when they were arrested on the complaint of Grosvold, and the case being brought before the Commissioner at Valdez, was dismissed (Trans., pp. 80-81). Whelpley then returned to the island on March 10, 1916, and trapped twelve foxes, killing the last one of these on March 12th of that year (Trans., pp. 81-83). On March 20th of that year the plaintiff commenced this action for an injunction against the defendant and for damages, and the complaint therein was served immediately afterwards.

It further appears from the evidence that there were approximately seventy pairs of foxes on the island at the time and that at the time of the trial of the action in July, 1916, after the breeding season of that year, there were approximately one hundred and thirty pairs of foxes on the island (Trans., p. 85), and that it would take two trapping seasons to get these off (Trans., pp. 86 and 109); that the value of the traps, houses, etc., was at that time approximately $1,500 (Trans., p. 71), and that the value of the live foxes was then $200 a pair, and the value of the skins $60 each (Trans., pp. 71-72).

To this complaint defendant filed a demurrer which was overruled; an exception to the ruling was taken and allowed and the defendant answered, and to the

answer a reply was filed by the plaintiff. After a trial Findings of Fact and Conclusions of Law were signed and filed (Trans., pp. 218-220), to which the defendant duly filed exceptions, which were allowed (Trans., pp. 220-222). Judgment for the plaintiff was thereupon signed, filed and entered (Trans., pp. 223-224) and from this judgment defendant has prosecuted this appeal.

In the foregoing statement of the case we may have transgressed the rule of this Court as to brevity, and if so, we apologize therefor, but we believed an extended statement was necessary in order the better to present those matters which we rely upon in this brief as showing wherein the decree was erroneous. We particularly urge herein the assignments of error numbered in the Record I, III, VII, XI and XII, and so that the Court may not be confused in our references in this and in the other brief we shall maintain the same numbers herein in the following

SPECIFICATIONS OF ERROR.

I.

The Court erred in overruling the demurrer interposed and filed by said defendant to the complaint of the plaintiff on the ground that said complaint did not state facts sufficient to constitute a cause of action.

III.

The Court erred in permitting the introduction in evidence by the plaintiff at the trial of said cause of an exhibit marked Plaintiff's Exhibit "A", and in per-

mitting the plaintiff to testify concerning the same. (This was the lease to the plaintiff and the questions propounded respecting the same, the answers thereto, the objections of the defendant and the ruling of the Court upon such objections, as shown by the record, are set forth in the record [Trans., pp. 30-31] and in Appellant's Opening Brief, but to avoid repetition are here omitted.)

VII.

The Court erred in overruling the objections of defendant to the testimony of plaintiff concerning conversations he had with Mr. Colwell. (The questions propounded relative thereto, the testimony of the plaintiff, the objections of defendant, and the rulings of the Court upon such objections, as shown by the record, are set forth in the record [Trans., pp. 33-34] and in Appellant's Opening Brief, but to avoid repetition are here omitted.)

XI.

The Court erred in making, filing and entering its Findings of Fact and Conclusions of Law, made, filed and entered herein on the 12th day of August, 1916, over the exception to the same made by the defendant, which said exceptions were duly allowed by the Court.

XII.

The court erred in making, filing and entering its judgment and decree herein, made, filed and entered on the 12th day of August, 1916.

ARGUMENT.

THE COMPLAINT DID NOT STATE A CAUSE OF ACTION.

The complaint in this action is for an injunction against a trespass. Predicated as it is upon a leasehold estate and an interference with plaintiff's possession thereunder, it must depend for its sufficiency upon the validity of the lease, a showing of possession by plaintiff and an interference therewith by one having inferior rights; also that there is or will be damage by reason of such interference and that there is no plain, speedy and adequate remedy at law therefor.

It is evident from the complaint that the plaintiff bases his rights entirely upon the lease, and that stripped of the lease he stands without rights against the defendant even upon his own allegation, which, of course, must be taken most strongly against him as the pleader. Having alleged his residence in Paragraph I, he alleges in Paragraph II that the island is the property of the United States, in Paragraph III that since July 1, 1914, he has been the owner of a leasehold estate therein by virtue of a lease thereof from the United States, a copy of which is attached to the complaint and made a part thereof, but nowhere in the complaint does he allege that he entered into possession under that lease. The only allegation of fact in the complaint which in any way bears upon the possession of the plaintiff is the allegation in Paragraph V "That on or about the fifth day of November, 1915, plaintiff stocked said island with seven pair of blue foxes, and placed a keeper in charge thereof." Apparently, therefore, he had done nothing

toward entering upon the island or taking possession thereof under his lease, or otherwise, at any time prior to November 5, 1915, which was a year and four months after the date of his lease. Nor does he allege what he did in the matter of stocking said island on that date with the foxes, except that he placed a keeper in charge, nor does he allege how long the keeper remained on said island in charge, nor whether he or any representative of his was ever thereafter on the island or remained in possession thereof or was in possession thereof at the time of the commencement of the action. For all that appears in the complaint he may have merely sent a man to place the foxes on the island and that person have left the island shortly thereafter, and there may have been no person representing him there at any time thereafter.

It is alleged in Paragraph VI that the defendant entered upon the island on or about December 16, 1915, and again on December 19, 1915, and on many occasions thereafter, but there is no allegation in the complaint that plaintiff was by himself or any of his representatives, or in any other way, in possession of the island at or during any of these times. And we submit that it does not constitute a sufficient allegation of possession to merely show that at one time he placed foxes on the island and put a keeper in charge, without showing also that he or such keeper or some other representative of his, or that he in some manner other than by the mere presence on the island of the foxes, remained in possession during the alleged acts of interference. If the presence of those foxes thereon would

constitute his possession, then equally would the continued presence of foxes belonging to a previous occupant be the continued possession of that occupant.

On the other hand, it is alleged in Paragraph VII that the defendant first entered on said island contrary to the rights of the plaintiff on or about the month of September, 1914, and trapped foxes which were on said island "when leased as aforesaid by plaintiff". Here, then, we have a showing that defendant had entered the island and was in possession thereof and trapping foxes thereon over a year before the plaintiff entered or placed his foxes thereon. It is evident, therefore, that unless the rights of plaintiff can be sustained through the allegations as to the lease, he stands, upon his own showing, with rights inferior, so far as the land is concerned, to those of defendant, who appears by the complaint to have been a prior occupant. If the lease was void certainly the plaintiff could claim no damages for the foxes trapped by the defendant in September, 1914. And as to the foxes which were trapped by the defendant in December, 1915, and subsequently, after plaintiff had placed his foxes on the island in November, 1915, the remedy to plaintiff, if the lease was void and he could show that those foxes trapped were his and not those of the defendant, the previous occupant, would be by an action at law for conversion and not in equity for an injunction.

Assuming that, stripped of the lease, the statements as to the stocking with foxes and placing a keeper in charge are a sufficient allegation of possession, we

then have a complaint by one who has placed his foxes on public lands and who seeks by injunction to restrain another, who has theretofore occupied such lands and trapped foxes thereon, from enjoying in the public lands a right which is equal, if not superior, to his own.

It should be noted that even if valid the lease did not have the effect of putting the plaintiff in possession, nor did he by reason thereof acquire any rights against the defendant for acts done by the latter before any possession was taken by the plaintiff after the lease was made.

The interest of one holding a leasehold estate before entry thereunder is what is known as an *"interesse termini"*, a right to the possession of a term in the future. It confers upon him no right to maintain trespass against one who enters the property between the time of the execution of the lease and the taking of possession thereunder.

> 18 Am. & Eng. Ency. of Law, 2d ed., p. 212 (and cases cited);
> *Morrison* v. *Chicago & N. W. Ry. Co.*, 91 N. W. 793.

In the case last cited the Court said:

> "It is apparent that the lessee had no cause for action for anything done prior to taking possession, March 1, 1900. Until then his interest was what is known as an 'interesse termini,'—a right to the possession of a term in the future. The lease conferred the right to enter; nothing more. Before going into possession, he could not maintain trespass for the tortious invasion of the property, nor by such invasion could his rights

be in any wise affected. *Birckhead* v. *Commins,* 33 N. J. Law 55; *Wood* v. *Hubbell,* 10 N. Y. 479; 18 Am. & Eng. Enc. Law (2d ed.) 553. He is not asking damages to the land itself. Any injury to the reversion necessarily belongs to the owner. The injury of which plaintiff complains is solely to the enjoyment of the use and possession."

See also

Wood v. *Hubbell,* 10 N. Y. 479, 488.

That a tenant for years cannot maintain an action for trespass upon the leased premises unless he was in the actual possession thereof at the time of the alleged entry of the defendant, is well settled.

Heilbron v. *Heinlein,* 72 Cal. 172.

And as said in another case, if an action at law cannot be maintained for trespass when the plaintiff is not in possession "*a fortiori* in such case a court of equity will not interfere to restrain the commission of threatened trespass".

Felton v. *Justice,* 51 Cal. 529.

Therefore, as possession alone without the lease would give him no right to an injunction against the defendant, and as the lease alone without possession would give him no rights to such injunction, it was necessary for plaintiff's cause of action, both that the lease be valid and that he should have taken possession thereunder. This latter, we contend, is not sufficiently alleged, but if we are in error in that, we still maintain that the lease was void for several reasons, which

we now present. And in the argument of this point, again to avoid repetition, we shall present matters which, though they might not all be urged against the sufficiency of the complaint, may each and all of them be urged in support of the assignments of error respecting the Findings of Fact and Conclusions of Law, and respecting the Judgment.

The Lease Was Void.

Under the Constitution, Congress alone has power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

> Constitution, Art. IV, Sec. 3, Par. 2;
> *United States* v. *Gratiot,* 14 Pet. 537;
> *United States* v. *Fitzgerald,* 15 Pet. 407.

In the absence of legislation by Congress neither the President nor any other officer has any authority to dispose of the public property of the United States.

> *Knote* v. *United States,* 10 Ct. Cl. 397;
> *Flores* v. *United States,* 18 Ct. Cl. 352;
> *United States* v. *Nicoll,* 1 Paine 646.

The President can neither dispose thereof by lease or otherwise, nor authorize any department to do so.

> 4 Op. Atty. Gen. 480.

Nor can the Secretary of the Treasury execute or approve of a lease of any property of the United States without special authority of law, nor does the

approval of the lease by the Secretary of the Interior give it any weight.

United States v. *Hare,* Fed. Cas. No. 15303.

And in the case last cited it was further held that no officer had the power to make reservations of the public lands except as authorized by Congress, and that the attempted lease and approval thereof did not constitute a reservation.

The general supervision with respect to the public lands of the United States has been vested by Congress in the Secretary of the Interior, and unless Congress clearly designates some other officer to act in respect to such matters, it will be assumed that he is the officer to represent the government.

Knight v. *U. S. Land Assn.,* 142 U. S. 161, 177;
Johanson v. *Washington,* 190 U. S. 179, 185;
Fisher v. *United States,* 37 App. D. C. 436.

All the vacant and unappropriated lands in Alaska at the date of the cession in 1867 by Russia became a part of the public domain and public lands of the United States.

United States v. *Berrigan,* 2 Alaska 442;
Kinkead v. *United States,* 150 U. S. 483;
Walsh v. *Ford,* 1 Alaska 146;
Carroll v. *Price,* 81 Fed. 137;
Rasmussen v. *United States,* 197 U. S. 516.

Islands are part of the public domain over which the Secretary of the Interior exercises jurisdiction in the absence of other legislation by Congress.

Opinion to William Reninger, 1 Land Dec. 596.

It remains to be observed what Congress has done, if anything, toward transferring from the Secretary of the Interior the authority which otherwise could be exercised only by that officer over the island here in question; and to what extent and under what conditions and by whom it has, if at all, authorized the leasing of his island.

By Section 6 of Chapter 273 of the Act of July 27, 1868, afterward Section 1956 of the Revised Statutes, dealing with the killing of fur-bearing animals within the limits of Alaska Territory and the waters thereof, Congress conferred upon the Secretary of the Treasury power "to authorize the killing of any such mink, marten, sable or other fur-bearing animals, except fur-seals, under such regulation as he may prescribe." This section was amended by Section 4 of Chapter 183 of the Act of April 21, 1910, and the Secretary of Commerce and Labor was substituted for the Secretary of the Treasury.

By Section 1 of Chapter 182 of the Act of March 3, 1879 (20 Stats. 383; R. S. 3749), Congress conferred upon the Secretary of the Treasury authority "to lease, at his discretion for a period not exceeding five years, such unoccupied and unproductive property of the United States under his control, for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress."

It is evident that the power given to the Secretary of the Treasury under the first of these acts, to prescribe regulations for the killing of fur-bearing animals, did not carry with it the power to lease any

public lands of the United States, and it will be noted that in the Act of 1879 the power to lease is expressly limited to *unoccupied and unproductive property under his control.* Nor can it be said that the power to regulate the killing of such animals gave him control of the lands within the meaning of the Act of 1879.

By Section 8 of the Act of Congress of May 17, 1884 (23 Stats. 24), dealing with Alaska, it was provided that "Indians and other persons in said District shall not be disturbed in the possession of any land actually in their use or occupation or now claimed by them, but the provision under which such persons may acquire title to such lands is reserved for future legislation by Congress; * * * that nothing contained in this Act shall be construed to put in force in said District the general land laws of the United States."

By the Act of Congress of May 14, 1898 (30 Stats. 413), the Homestead laws were extended to the District of Alaska subject to such regulations as might be made by the Secretary of the Interior. By Section 10 of that Act any citizen thereafter in possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, was permitted to purchase one claim not exceeding 80 acres of such land, but if two or more claimed the same land the person having the prior claim by reason of possession and continued occupation should be entitled to purchase the same. To these provisions in that section there

was added therein the following: "Provided, that the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act."

As heretofore stated, at this time Little Koniuji Island had been occupied for the propagation of foxes since 1895, and there is some evidence from which it might be inferred that permission to so occupy it had been granted by the Secretary of the Treasury since 1896.

By the Act of Congress of February 14, 1903 (32 Stats. 825), the Department of Commerce and Labor was created and its powers and duties defined. By Section 4 of that Act there was transferred to it certain departments and offices therein mentioned, including the Fish Commission and all that pertained to the same. It was then provided by Section 7 of that Act that "the jurisdiction, supervision and control now possessed and exercised by the Department of the Treasury over the fur-seal, salmon and other fisheries of Alaska * * * are hereby transferred and vested in the Department of Commerce and Labor." It was also provided by Section 10 of that Act that "the power and authority now possessed or exercised by the head of any executive department in and over any bureau, office, officer, board, branch or division of the public service by this Act transferred to the Department of Commerce and Labor, or any business arising therefrom or pertaining thereto, or in relation to the duties performed by and authority conferred by law upon such bureau, officer, office, board, branch or

division of the public service * * * shall hereafter be vested in and exercised by the head of the said Department of Commerce and Labor."

It will be noted that the power and authority to be thereafter vested in and exercised by the Secretary of Commerce and Labor was limited by Section 10 of that Act to that previously possessed or exercised by the head of any executive department *in and over any bureau, office, etc., "by this Act transferred* to the Department of Commerce and Labor." It will also be noted that the matters transferred from the Treasury Department by Section 7 were limited to the jurisdiction and supervision and control then possessed and exercised by that Department "over the fur-seal, salmon and other fisheries of Alaska."

Nowhere in that act are there any words which could be construed into an enactment or expression by Congress that the authority to lease unoccupied property of the United States under his control, which Congress had conferred upon the Secretary of the Treasury by the Act of March 3, 1879, should thereafter be vested in and exercised by the Secretary of Commerce and Labor.

On February 2, 1904, however, President Roosevelt attempted to do what Congress had not done, and assumed unto himself an authority over the public domain which the Constitution had by Section 3 of Article IV thereof, expressly vested in Congress. For on that day he promulgated the following executive order:

> "Upon the recommendation of the Secretary of the Treasury and the Secretary of Commerce and Labor, it is hereby ordered that the authority of the Secretary of the Treasury to lease certain islands in Alaska for the propagation of foxes, and all duties and powers pertaining thereto, shall be transferred to and vested in the Secretary of Commerce and Labor."

For this order there was no legislative sanction or authority. The only power conferred upon the President with respect to the transfer of authority from any other department to the Department of Commerce and Labor was that contained in Section 12 of the Act of February 14, 1903, noted above, which expressly limited that power to the transfer of "any office, bureau, division or other branch of the public service, *engaged in statistical or scientific work*" and by no process of reasoning could this provision be held to justify his action.

Furthermore, it was in direct contravention of the Act of Congress of May 17, 1884, noted above, which had provided that *no person in Alaska should be disturbed in the possession of any land therein, actually in their use or occupation,* but that the provision under which such persons might acquire title to such lands *was reserved for future legislation by Congress.*

But the appellee urges as an authority to the validity of the lease an opinion rendered under date of June 24, 1905, to the Secretary of Commerce and Labor by the then Attorney General Moody and found in volume 25 of Opinions of Attorneys-General at page 497.

That opinion was rendered in response to an inquiry addressed by the Secretary of Commerce and Labor to the Attorney General as to whether he had authority to lease the Islands of St. Paul and St. George in Alaska for the propagation of foxes, and, also, as to his authority to lease other islands in general in Alaska for the same purpose. With reference to the first inquiry the Attorney General held that the Act of February 14, 1903, noted above, creating the Department of Commerce and Labor transferred to the Secretary of Commerce and Labor the same authority over the islands of St. Paul and St. George that was theretofore possessed by the Secretary of the Treasury and that he might therefore lease those islands for the purpose stated. There was some authority for this holding for the act in question had transferred to the Secretary of Commerce and Labor the jurisdiction and control over the fur-seal fisheries then possessed and exercised by the Secretary of the Treasury. The islands of St. Paul and St. George were fur-seal islands and by the Act of March 3, 1869, (15 Stat. 348; R. S. sec. 1959) Congress had expressly declared these two islands a special reservation and made it unlawful for any person to land or remain thereon except by authority of the Secretary of the Treasury; and in addition thereto he was by that act given extensive authority over those two islands with respect to the fur-seal fisheries thereon, and the power to lease the same in connection therewith.

With respect to the second inquiry the Attorney General held that the Secretary of Commerce and

Labor had authority to lease for the same purpose such other islands in Alaska as had been so leased by the Secretary of the Treasury prior to the Act of May 14, 1898, above noted. His conclusions upon this question, and his reasons assigned therefor, are, we submit, unsound and fall of their own weight, especially in view of the final conclusion in his opinion that the Secretary of Commerce and Labor had no authority to regulate the killing of fur-bearing animals in Alaska, other than fur-seals, as that power had never been transferred to him from the Secretary of the Treasury by Congress. We submit if he did not have the latter power he did not have the power to authorize by any lease the propagation of foxes or to lease the islands for any such purpose which would imply a regulation of conduct with respect to such animals.

We also submit that his conclusions and reasons with respect to the power to lease were unsound. He states that since 1882 the Secretary of the Treasury has assumed and exercised authority to lease various islands other than St. Paul and St. George for the propagation of foxes, but that such action was apparently without statutory sanction until the Act of May 14, 1898, above noted. He found, however, in the proviso in that Act, excepting from the operation thereof "The Annette, Pribilof Islands and the islands leased or occupied for the propagation of foxes," statutory evidence of legislative acquiescence which to his mind clearly established the authority of the Secretary of the Treasury to continue to lease for

this purpose such islands in Alaska as had been so leased by him prior to that Act. To this he added by quoting the executive order of February 2, 1904, above noted, expressed the view that the authority of the President to make this order, especially in the absence of any inconsistent statutory provision was beyond question, cited earlier opinions of Attorneys General which were not in point, and concluded by advising the Secretary of Commerce and Labor that he was authorized to lease, for the propagation of foxes such islands in the waters of Alaska as had been so leased by the Secretary of the Treasury prior to May 14, 1898.

We submit that in this opinion the Attorney General overlooked, as has the appellee, several important points. In the first place it is not disputed that the Secretary of the Treasury had authority to lease an island for the propagation of foxes provided that island was unoccupied and under his control. Such right was given him by the Act of 1879 with those conditions attached, but both of these conditions were ignored in the opinion. That which the Secretary had done prior to the Act of 1898 was not a leasing, but the granting of a mere license or privilege. The distinction between a license and a lease is that a lease gives to the tenant the right of possession against the world, including the owner, while a license creates no interest in the land, but is simply the authority or power to use it in some specific way.

Joplin Supply Co. v. *West,* 149 Mo. App. 78; 130 N. W. 156, 161;

Shaw v. *Caldwell,* 16 Cal. App. 1; 115 Pac. 941, 943;
Roberts v. *Lynn Ice Co.,* 187 Mass. 402; 73 N. E. 533, 534.

The documents purporting to be addressed to Neuman, even if signed and issued, were not leases, but mere licenses and would not prevent the occupation of the island by others under Alaska laws.

Furthermore, it is evident that the proviso in the Act of 1898 was not inserted therein with the intent suggested by the Attorney General. From the Act of 1879, as well as from the Acts of 1884 and 1898, there can be gathered but one intent on the part of Congress and that, clearly expressed in each act, was to protect the person in possession. This was evidenced in the Act of 1879 by the restriction of the power to lease to *unoccupied* property, by the provision in the Act of 1884 declaring that persons in Alaska should not be disturbed in the possession of any land actually in their use or occupation, and by this very proviso in the Act of 1898, for by that Act Congress was extending for the first time the homestead laws to Alaska, and realizing that these islands might otherwise be entered under those laws to the detriment of those in possession, it sought to protect those in possession by excepting from the operation of the Act the islands *leased or occupied* for the propagation of foxes.

If it be said that this proviso was a legislative sanction or ratification of the act of the Secretary in leasing such islands for the purpose stated, regardless of whether they were under his control and an authority

to him to do so, equally can it be claimed that it was a legislative sanction of the occupation of such islands without leasing the same, and a permission to do so in the future, and if such occupation was had at a time when they were not under lease to, or occupied by another person, there would thereby accrue to the occupant a vested interest, recognized by Congress, which could not be divested by any lease made by the Secretary of the Treasury or by the Secretary of Commerce while such occupancy continued.

But we submit that the true interpretation of this proviso is not that suggested by the Attorney General, but that realizing that the Secretary of the Treasury might have made some leases of unoccupied islands under his control, for the purpose stated, as indeed he had the power to do, as in the cases of the islands of St. Paul and St. George, and perhaps others, and realizing also that some islands had been occupied for that purpose without leases, as indeed they might be under the Act of 1884, and other acts, and the decisions of the Federal Courts of Alaska, Congress adopted this proviso to the end that all such occupants might be protected, and to make it comprehensive excepted from the operation of the Act both those islands which had been leased and those which had been occupied without lease.

If that be the true construction of the proviso there is no Act of Congress which authorized the Secretary of the Treasury to lease occupied islands not under his control, nor did the executive order confer upon the Secretary of Commerce such authority, that order pur-

porting to confer upon the latter official only such authority as was possessed by the former official. But whether or not this is the true construction of the proviso there was no authority in the Secretary of the Treasury to lease occupied islands except certain named islands of which the island here in question was not one. Furthermore, there was no authority in the President to transfer the authority, such as it was in this respect, from the Secretary of the Treasury to the Secretary of Commerce, his authority in the matter of transfer of jurisdiction being confined in the Act of 1903, as heretofore noted, to the transfer of any office, bureau, etc., *engaged in statistical or scientific work.*

At the time this lease was made, therefore, the Secretary of Commerce was not authorized to make the same, and the lease was void. It could not, for that reason, confer upon the lessee any right to possession of the island. As the allegations in the complaint were predicated upon such lease, and as without it no possession or right thereto was alleged or shown, we submit that the complaint did not state a cause of action or entitle the plaintiff to the relief sought, and that the demurrer should have been sustained.

Errors in the Admission of Evidence.

What has heretofore been said will also apply to and sustain the specification of error numbered III (the second one assigned in this brief), for if the Secretary of Commerce had no authority to execute the lease it was improperly admitted in evidence over the objection of defendant, one of the grounds of objec-

tion which was made at the time being the want of such authority (Trans., pp. 30-31).

With respect to the specification numbered VII (the third one assigned in this brief) we desire to note that the plaintiff was permitted, over objection, to testify as to conversations which he had, out of the presence of the defendant, with one Colwell (Trans., pp. 33-36) the purport of which was to show, as stated by counsel for plaintiff (Trans., p. 34), that Grosvold acquired title to the foxes on the island through an agreement with Colwell. Up to that point the evidence had only shown that Colwell was acting as agent for the Fundy Fox Company, but there was no evidence connecting him with Whelpley nor any evidence connecting Whelpley with the Fundy Fox Company except the mere statement of the plaintiff that he understood that Whelpley had possession of the island, acting for the Fundy Fox Company. It is apparent that this statement was a mere conclusion of the plaintiff and that Whelpley's connection, if any, with that company, or that company's rights in the island, if it had any, could not be shown in this manner. Furthermore, this evidence was not subsequently supplied, but on the contrary it was shown by the testimony of the manager of that company that it had never engaged in the business of propagating foxes on the island in question, or had anything to do with that island, and that Colwell did not represent that company with respect to that island (Trans., pp. 167-174). Though Whelpley testified that he had sent Colwell to the island he expressly stated that he only had authority

to get what foxes he could until he, Whelpley, came back, and that he had no authority to release Whelpley's rights or the rights of the Provincial Fox Company (Trans., pp. 72-76), and there was no testimony to the contrary. This Provincial Fox Company was the company for which Whelpley was acting in trust on the island—having bought from Reid with funds of that company, and holding the property in his own name as security for money owing to him by that company, as to which he had settlements from time to time (Trans., pp. 69 and 105).

We submit that in the absence of any showing that Colwell was authorized to bind the defendant by any agreement he might make, the defendant is not to be bound by any such agreement, and therefore the admission of the plaintiff's testimony as to his conversations with Colwell resulting in such agreement was error on the part of the trial court.

The Findings of Fact and Conclusions of Law.

The specification of error numbered XI (the fourth in this brief) is founded upon the findings of fact and conclusions of law, in the making of which we claim that the court erred in that they were contrary to law and not supported by the evidence, and in addition thereto were insufficient to support the judgment.

The second purported finding of fact involves a conclusion of law. What we have heretofore said with respect to the power of the Secretary of Commerce to lease, applies to this finding so far as it purports to establish as a fact that the United States, through the

Department of Commerce, leased the island to the plaintiff, and that said lease became effective in his favor on July 1, 1914. If the Secretary of Commerce had never been legally authorized to make such lease on behalf of the government, it is clear that the finding either as a fact or as a conclusion is erroneous.

The third purported finding of fact is clearly a conclusion of law, but whether law or fact it is erroneous for the reasons heretofore stated.

The fourth purported finding of fact combines both conclusion of law and findings of fact. In neither phase of it is it supported either in law or by the evidence. And here we desire to urge grounds of invalidity of the lease which, though we have heretofore mentioned them, we could not then appropriately enlarge upon in the argument upon the demurrer.

We insist that the authority to lease, whether vested in the Secretary of the Treasury or in the Secretary of Commerce, must find its basis in the Act of 1879 which restricted that power to *unoccupied and unproductive property*. Even if the Secretary of the Treasury had control over this island he could not lease it if it was then occupied. There is no evidence in this or in any other case that he ever exercised the power to lease occupied property, but, on the contrary, there are opinions of the Attorneys General, rendered prior to that of Attorney General Moody, to the effect that the power to lease could not be exercised where the property was occupied at the time. And it will be noted that even Attorney General Moody did not touch upon that point in his opinion, apparently assuming, as he

must have been familiar with these other opinions, that the islands to which the inquiry was addressed were unoccupied.

In one case the Attorney General investigated to ascertain whether certain land was occupied in 1890, at a time when a lease thereof was made, and held that as it was being used at the time it was not "unoccupied" within the Act of March 3, 1879.

20 Op. Atty. Gen. 537.

On January 25, 1897, the then acting Attorney General rendered an opinion to the Secretary of the Treasury that he had no power to lease for any time the property placed in his charge, without express authority of law; that he had no authority to lease any part of Ellis Island in New York Harbor as the Act of March 3, 1879, did not authorize such lease, for the island was both productive and occupied.

21 Op. Atty. Gen. 476.

In the case at bar not only was there no showing by the plaintiff that the island was unoccupied at the time of the lease, or a finding to that effect by the court, both of which we believe to have been necessary, but, on the contrary, there was the undisputed evidence of the defendant and his witnesses that he was in possession at that time, had been since May, 1913, and continued in possession even after the action was commenced (Trans., pp. 66-67 and 148). And even the plaintiff's own testimony corroborates this and shows that someone was in possession at the time

of the lease. To this point there is his statement that Whelpley was in possession (Trans., p. 32), and also his negotiations with Colwell as to the removal of the property from the island (Trans., pp. 34-35).

The finding, therefore, that while the plaintiff, by virtue of said lease, was entitled to the undisturbed and exclusive possession of the island, defendant entered wrongfully and committed divers trespasses, is without justification either in law or on the evidence, for the island, being occupied at the time of the lease, that lease was void and plaintiff acquired no rights thereunder to the island or to possession thereof, nor was defendant committing any trespasses in entering thereon, for he was lawfully entitled so to do under the laws of Alaska, as recognized by several decisions.

In *Carroll* v. *Price, supra,* decided in 1896, it was held that persons have the right to enter the public lands in Alaska and occupy and use the same, that this right had been recognized by the Act of Congress of May 17, 1884, and that of two persons claiming possession the one prior in possession has the prior right, and that this possessory right may be conveyed by one person to another.

Carroll v. *Price,* 81 Fed. 137.

This same principle was announced as to one who entered such lands for the first time in 1900.

Walsh v. *Ford,* 1 Alaska 146.

And also in a case where the same person made several entries at different times from 1901 to 1906

Burr v. *House,* 3 Alaska 641.

It cannot, therefore, be said that the defendant was in anyway a trespasser at the time of the lease. On the contrary he was in possession openly and as of right by purchase, and protected therein under the laws of Congress and the decisions of the courts.

Upon such rights the plaintiff was himself the trespasser, and the fourth finding was therefore erroneous.

As to the fifth finding, the lease could not under any circumstances convey the personal property to the plaintiff, nor could the latter acquire the same except by agreement or abandonment. There was no agreement, and certainly no abandonment, notwithstanding the effort to bind the defendant through Colwell, in the testimony of plaintiff heretofore discussed.

The defendant was, therefore, entitled to his property and to a reasonable time to remove the same even though the lease was valid, and of course if invalid we are not concerned with what length of time he took to remove the same. That he was not accorded a reasonable time is evident, for as heretofore shown in the statement of facts, it would take two trapping seasons to remove the property; these he was not given for in the first season in the fall of 1914 he was obstructed by the plaintiff and his men, and in the second season in the fall of 1915 he and his men were arrested while trapping, at the instance of the plaintiff, and could not

return until March, 1916, and immediately thereafter the injunction proceedings were commenced.

We submit that the defendant was not allowed, as he should have been, a reasonable time to remove his property, that there was more property on the island to which the defendant was entitled, and that the fifth finding was contrary to law and the evidence.

The conclusions of law being based upon the findings of fact fall with those findings. But in addition thereto we urge that it is essential to any action based upon a trespass that there must have been a possession interfered with. Any conclusion of law, in such an action, that the plaintiff is entitled to an injunction restraining a trespass or disturbing his possession must rest upon a finding of fact that plaintiff was in possession and that such possession was interfered with wrongfully, and if there be no such finding of fact the conclusions of law cannot stand, nor can the judgment be supported by the findings.

In the findings of the court in the present case there is not to be found a statement or a bit of evidence of the fact, or to the effect, that the plaintiff was ever at any time in possession of this island. There is a statement to the effect that he was entitled to the possession but that is entirely distinct from his being in possession. The findings placed the plaintiff in a position where his interest was an *"interesse termini,"* and thereby denied to him the right to maintain trespass or an injunction against trespasses. They are, therefore, insufficient and cannot support either the conclusions of law or the judgment subsequently entered thereon.

THE JUDGMENT.

The judgment is erroneous for each and all of the reasons herein before advanced, especially in view of the fact that it is not supported by sufficient findings as heretofore shown. In terms also is it erroneous for it restrains the defendant "forever" and is not confined to the term of the lease, if that be valid, in that respect going beyond the prayer of the complaint; and must in any event be modified to the extent noted, and also to allow the defendant a reasonable time to obtain the balance of his property.

In the brief on behalf of appellee it is argued that there has been a reservation of this island by virtue of what has been done. We are unable, however, to determine what particular action, and by which officer of the government, such reservation was established.

That there can be no reservation on the public domain except by authority of Congress cannot be questioned. Such was the holding in the case heretofore cited,

United States v. *Hare,* Fed. Cas. No. 15303.

Congress has not by any act evidenced an intent to authorize a reservation of this island by the making of a lease thereof, nor did the President or Secretary attempt or intend a reservation in any action that they may have taken with respect to this island and the leasing thereof.

In appellee's brief it is also intimated that the defendant by bidding for the lease through his partner Williams is estopped to question the lease. That a

tenant cannot question the title of his landlord will be admitted, but we have never understood, and can find no authority holding that one who is not a tenant but has merely offered to lease in order to protect his rights, is to be held to have estopped himself from claiming those rights which he thereby sought to protect.

We cannot close this brief without quoting to the court, as evidencing the equities of the case in favor of defendant, a portion of the "Report of Alaska Investigations in 1914" made by Hon. E. Lester Jones, Deputy Commissioner of Fisheries, under date of December 31, 1914, and printed at the Government Printing Office at Washington in 1915. He was the one under whose advice, apparently, the lease in question was made. An investigation made by him thereafter induced him to report as follows under the heading

ISLAND FOX FARMS.

> "By Executive order dated February 2, 1904, authority to lease certain islands in central and western Alaska for the purpose of fox raising was transferred from the Secretary of the Treasury to the Secretary of Commerce. On paper the minimum lease price of $200 per annum for these islands seemed fair, and without any knowledge of what these islands were, assuming that they were adapted to such purposes, the offer made by the Government seemed to be an inducement that should be readily taken up. But as time went on there were only four of them that were actually leased for from $200 to $250 per annum, the leases to run five years. This seemed strange to me, but since my visit to a number of the islands and after looking into other conditions relative to fox

farming the atmosphere has cleared and I understand a great many things that I did not know before. Two hundred dollars per annum does not seem much to people when they hear of foxes being sold for from $5,000 to $10,000 a pair; but as I have already stated, these unnatural and artificial prices can not possibly apply to the islands situated in the Pacific Ocean off the coast of Alaska. The quality of the fur from these islands is not as good as that from inland areas farther north. The man who goes out to that isolated country to carry on this work alone has a hard row to hoe. With a capital of, say, $3,000, he must lay aside $800 to pay for his lease for the first four years, as he must not expect any return from his initial stock before the end of that time. Then he has to buy his foxes for a starter, and supposing he bought half a dozen blue foxes, the cost would be in the neighborhood of $1,200. There is $2,000 gone already. And the balance will be well utilized in feeding himself and his stock and in paying other expenses.

"In figuring this, I have not allowed anything for corrals, for in most cases on these islands the foxes do better to run at large; but it must be understood that on many of the islands in western Alaska, including some of those offered by the Government for leasing, there is not enough natural food to take care of what would ordinarily constitute a fair number of foxes for such an area. Therefore, a man must provide food at more or less cost the year round. If he does his own work he has no income for the first four years. If he is fortunate enough to have a good position and still more fortunate in securing a reliable man to look after things for these four years, the chances are that matters will be in pretty good shape at the expiration of his lease. Then what is going to happen? Some other man may outbid him, and his time, labor, and buildings are all gone. * * * Under the present

leasing system, at the end of five years a man may lose the island where his money and efforts were spent during the life of the lease. I would suggest that the men who have already leased these islands should be advised at once that the Government extends the right to the leasing of their islands to ten years, with the privilege of renewal for ten more. This would be highly satisfactory, and would create confidence and satisfaction which does not exist today among those who have leased islands or are contemplating such a step. * * *

"There is another phase of the leasing system that I have looked into which works a hardship and is apparently unjust as shown by the following example: Mr. J. C. Smith in 1907 moved to Simeonof Island, one of the extreme outer islands of the Shumagin Group. He was a poor man and had to work hard, occupying himself in tilling the soil and in general farming. He has raised a large family—nine children, I understand—and it has been difficult for him to get along. Then after 17 years of hard work the Government interfered and this island on which he lives and to which he certainly has some prior right was offered to anyone in the country who wanted to lease it for fox-farming purposes. The result was that, to protect what little he had, Mr. Smith was forced to bid for the island, running the risk of losing it, and then begin raising foxes, whether he wanted to or not. For the next five years he must pay a total rent of $1,250, and at the end of that time again run the risk of losing his home. As already indicated, I think that, as a pioneer and one who has opened up a section of a vast territory, he deserves a present of the island instead of being saddled with a rental of $250 per annum.

"The present situation does not seem right or just. The poor man without means is the one who should be encouraged to take up these islands and

should be assisted in undertaking this work; he should have the support of the Government, and not be handicapped or held back by having some hardship imposed upon him."

In conclusion, we respectfully submit that the judgment for the plaintiff should be reversed, and on the prior possession in the defendant plainly shown, not only by him but also by the testimony of the plaintiff, judgment for the defendant should be ordered.

Respectfully submitted,

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Of Counsel for Appellant.